

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANDY MARTIN,  
Plaintiff,

v.

CITY OF SAN JOSE, et al.,  
Defendants.

Case No. [19-cv-01227-EMC](#)

**ORDER RE NEGATIVE DISCOUNT  
RATE**

Docket Nos. 137-38

The Court has reviewed the parties' briefs regarding Plaintiff's expert Robert Johnson and his testimony relating to a negative discount rate. *See* Docket Nos. 137-38. The Court denies Defendants' motion to strike Mr. Johnson's testimony.

First, the motion to strike is untimely. Defendants did not seek to exclude Mr. Johnson's testimony until after he had already given his testimony to the jury. Defendants suggest that they did not know that there would be an issue with Mr. Johnson's testimony until he actually testified at trial because that was the first time he provided concrete numbers for inflation rates and interest rates. That is not wholly accurate. While the interest rate applied under the formula was revised upward at trial (thereby lowering the PDV of projected medical expenses) – compared to his initial report – his methodology remained the same. His initial report also presented a negative discount rate. Yet Defendants brought no timely challenge. Moreover, even though Mr. Johnson did revise the interest rate input, Defendants do not contend that he failed to disclose his methodology. Defendants therefore have not been prejudiced. He was subject to cross-examination on his assumptions at trial. And Defendants still have an opportunity to rebut in their case-in-chief.

Second, even if the motion to strike were timely, the Court would still deny it. The Ninth

1 Circuit did not hold in *Trevino v. United States*, 804 F.2d 1512 (9th Cir. 1986), that a negative  
2 discount rate is per se unreasonable. The court's ruling was based on flawed factual assumptions,  
3 not the conceptual issue of a negative discount rate. Nor is application of a negative discount rate  
4 barred by *Jones v. Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983). If Defendants take issue  
5 with the negative discount rate, that is a matter for cross-examination and rebuttal; it is not basis to  
6 exclude.

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8 **IT IS SO ORDERED.**

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10 Dated: May 24, 2021

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13 EDWARD M. CHEN  
14 United States District Judge  
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